No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARICOPA COUNTY, ARIZONA; W. H. LINVILLE, as County Treasurer, and Ex-Officio Tax Collector of Maricopa County, Arizona; J. D. BRUSH, as County Assessor of Maricopa County, Arizona; CHARLES H. FIELDS, JOHN A. FOOTE and GEORGE FRYE, as members of and constituting the Board of Supervisors and County Board of Equalization of Maricopa County, Arizona; PIMA COUNTY, ARIZONA; WALLACE S. BRANSFORD, as County Treasurer and Ex-Officio Tax Collector, of Pima County, Arizona; THOMAS COLLINS, R. H. MARTIN, and J. B. MEAD, as members of and constituting the Board of Supervisors and County Board of Equalization of Pima County, Arizona.

Petitioners,

vs.

THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,

Respondent.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT

On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX

TABLE OF CASES

Page

Baltimore National Bank vs. State Tax Commission, 297 U. S. 209, 56 Sup. Ct. Rep. 417, 80 L. Ed. 586 ..... 2, 10

Bank of U. S. vs. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244 10

Brophy vs. Powell, ———Ariz.———, 121 Pac. (2d) 647, 655 11

Coleman vs. Miller, 307 U. S. 433, 83 L. Ed. 1385, 59 Sup. Ct. Rep. 972, 122 A. L. R. 695 7

Conway vs. Mosher, 55 Ariz. 307, 311, 101 Pac. (2d) 209 3

Crane vs. Frohmiller, 45 Ariz. 490, 502, 45 Pac. (2d) 955 6

Ex Parte Bransford, 310 U. S. 354, 84 L. Ed. 1249, 60 Sup. Ct. Rep. 947 2

Gietz vs. Webster, 46 Ariz. 261, 50 Pac. (2d) 573 12

Maricopa County vs. Hodgin, 46 Ariz. 247, 50 Pac. (2d) 15, 101 A. L. R. 793 7

Pennsylvania vs. Wheeling Bridge Co., 18 Howard 421, 15 L. Ed. 435 9

Pima County vs. Grossetta, 54 Ariz. 530, 539, 97 Pac. (2d) 538 7

State vs. Hendricks, ———Ariz.———, 124 Pac. (2d) 768 6

Territory vs. Perrin, 9 Ariz. 316, 83 Pac. 361 11

TABLE OF CASES

Page

Trenton vs. New Jersey,
262 U. S. 182, 67 L. Ed. 937, 43 Sup. Ct. Rep. 534 5

U. S. vs. Alabama, 313 U. S. 274,
85 L. Ed. 1327, 61 Sup. Ct. Rep. 1011 11

Wayne County vs. U. S.,
53 Ct. Cl. 417, affirmed 252 U. S. 574, 40 Sup.
Ct. Rep. 394, 64 L. Ed. 723 9

Williams vs. Baltimore,
289 U. S. 36, 77 L. Ed. 1015, 53 Sup. Ct. Rep. 431.. 5

Yuma County vs. Arizona,
56 Ariz. 310, 312, 107 Pac. (2d) 374 3

TABLE OF CONSTITUTION AND STATUTES

CONSTITUTION OF THE UNITED STATES:

Fifth Amendment 8, 9
Tenth Amendment 10

Act of Congress of March 20, 1936 6

ARIONA CODE ANNOTATED 1939 (A. C. A.):

Sec. 17-309 8
Sec. 17-701 (5) 2
Sec. 17-714 2
Sec. 17-717 2
Sec. 73-205 ..... 4, 11
Sec. 73-410 4
Sec. 73-506 4
Sec. 73-701 2
Sec. 73-703 ..... 2, 4
Sec. 73-801 3
Article 8 3

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MARICOPA COUNTY, ARIZONA, et al,
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BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT

We will use the same heading symbols as are found in respondent's brief last filed.

A. 1. (a) (p. 5) Conceding that the assessment, levy and collection of taxes for the state and all of its subdivisions are entrusted to county officers, and that all such taxes when collected are distributed to the state, counties, school districts, and other taxing districts, respondent nevertheless contends that county treasurers in collecting county taxes do not act as agents of their counties.

By Section 73-701, A. C. A. 1939, it is provided: "The county treasurer shall be ex-officio tax collector." By the following section it is provided: "The county treasurer as tax collector shall collect all state and county taxes and apportion the same to the several funds at the end of each month." By this same section he is required to post a bond for the faithful performance of his duties. By Section 73-703, A. C. A. 1939, it is provided: "The county treasurer may at any time after receiving the roll,collect, by distraint and sale if not otherwise collected, the taxes due on personal property." By Section 17-717, A. C. A. 1939, it is provided: "The treasurer shall keep all money belonging to the state, or to the county, in his own possession until disbursed according to law." Section 17-701 (5), A. C. A. 1939, provides that the county treasurer shall "disburse the county money only on county warrants, issued by the board of supervisors, signed by the chairman and clerk of such board, or as provided by law." As to state moneys, Section 17-714, A. C. A. 1939, provides:

> "Upon the receipt of an order from the state treasurer requiring the money in the county treasury belonging to the state or collected for it, to be transmitted to the state treasury in the manner prescribed by law, the county treasurer shall within ten (10) days thereafter transmit the same in the manner directed by the state treasurer, and as provided by law, and such transmittal shall be at the risk of the state, if sent as the state treasurer directed."

Our views are in accord with the construction this Court has placed upon these statutes.

Ex parte Bransford, 310 U. S. 354, 84 L. Ed. 1249, 60 Sup. Ct. Rep. 947.

The two cases cited by respondent:

Conway vs. Mosher,
55 Ariz. 307, 311;
101 Pac. (2d) 209;

Yuma County vs. Arizona
56 Ariz. 310, 312;
107 Pac. (2d) 374;

hold that a sale of real estate under the provisions of Article 8, A. C. A. 1939, Collection of Delinquent Taxes, by the county treasurer for state and county taxes to the state passes title to the state and that the county's interest is in the proceeds which the state may later derive from redemption or disposition of the property. This holding is based upon the first section under that article, 73-801, which provides:

> Taxes upon real estate, if unpaid, shall become delinquent on the first Monday in November and the first Monday in May of each year, and the county treasurer shall enforce the lien of the state upon such real estate, as provided herein."

These cases do not stand for the proposition asserted by the respondent, namely, that the county treasurer is not the agent of his county for the collection of county taxes. They are confined to the single proposition that a sale under the procedure outlined in Article 8 of real estate to the State of Arizona results in a passing of title to the State of Arizona.

The Conway case was reheard and the opinion on the rehearing appears in 55 Ariz. 467, 103 Pac. (2d) 465, see heading 5. The court there points out that that action was one to quiet title to real estate:

> "The action was not one to determine whether the county had an interest in the taxes secured by the

lien. The county may be interested in the taxes, but it has no interest whatever in the lien securing the taxes. That is the state's."

And in this case we are considering the taxes on personal property. Section 73-506, A. C. A. 1939 is set forth in our petition for a writ of certiorari, page 13 of the appendix. It provides for a lien of all taxes on real and personal property, as of January 1st of the current year. And, more to the point, Section 73-205, A. C. A. 1939, which outlines the procedure for the assessment of taxes on bank stock, provides:

"The taxes due thereon shal be paid by such corporation or association, and shall be a lien against and assessed to such shares of stock, and no such corporation or association shall pay any dividends, etc."

See appendix to petition for writ of certiorari, page 9.

Whether the counties have a lien or not is not material. They have a right to taxes. The county assessor may at any time after the first of the year distrain and sell personal property for taxes if he believes the taxpayer is not possessed of sufficient real property to protect the tax, using the rate of the preceding year, if necessary. Sec. 73-410, A. C. A. 1939.* As we have pointed out, the county treasurer has similar power to distrain and sell personal property. Sec. 73-703, A. C. A. 1939.** It is because of that very power that the injunctions are against the county treasurers.

A. 1. (b) (p. 7) Here it is asserted that counties can acquire no vested rights independent of their creator, the state.

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* This Section is printed in the Appendix at page II.

** This Section is printed in the Appendix at page I.

The numerous cases cited by respondent stand for the proposition that the federal courts will not entertain a challenge by a part of the state against the entire state on the ground that the latter has deprived the former of its property without due process of law or violated the obligation of a contract between the two. The reason is self-evident. The creature of a state is in no position to challenge the acts of its creator on the basis of a constitutional guarantee directed against state action.

Trenton vs. New Jersey,
262 U. S. 182;
67 L. Ed. 937;
43 Sup. Ct. Rep., 534.

Williams vs. Baltimore,
289 U. S. 36;
77 L. Ed. 1015;
53 Sup. Ct. Rep. 431

We have no such case here. Neither the State of Arizona nor any of its counties or legal subdivisions is a creature of the United States Government.

The judgments are that the county taxes are void (Tr. 265, 332). It would seem appropriate that the counties themselves may challenge the validity of those judgments.

A. 2. (a) (p. 9) It is said that the county treasurers as individuals have no standing. This is conceded.

A. 2. (b) (p. 10) Under this heading respondent contends that county treasurers while agents of the State of Arizona are nevertheless without authority to raise the constitutional questions here presented.

The contention is reduced to this: that while the county treasurers can be sued as agents of the state, they have no right to defend in this court the interests of their principal.

The point of the argument is that county treasurers do not have the proper legal representation before this court. But the case they cite,

State vs. Hendricks,
———Ariz.———;
124 Pac. (2d) 768;

is to the contrary. In that case it was held that a state auditor might bring an action in the name of the state at the relation of her office and prosecute it through a private attorney whom she had employed.

The burden of that case and the other one cited by respondent,

Crane vs. Frohmiller,
45 Ariz. 490, 502;
45 Pac. (2d) 955;

is that one acting for the state may not use any state moneys for the employment of private attorneys where the attorney general is empowered to act—nothing more.

As agents of the State of Arizona these county treasurers are duty bound to present to this court the view which they entertain, to-wit, that the Act of March 20, 1936, is void insofar as it undertakes to destroy prior taxes, and they have the right to present their views to this court by any member of the bar of this court.

There is no rule of law or statute that confines the assertion in this court of states' rights to state attorneys general.

Coleman vs. Miller,
307 U. S. 433;
83 L. Ed. 1385;
59 Sup. Ct. Rep. 972;
122 A. L. R. 695.

And if the county treasurers cannot defend the state's rights in this court because the attorney general has not associated himself as counsel for the petitioners, what is to be said of the counties themselves—formal parties defendant to this action? In a case holding that a taxpayer may recover of a county taxes, state and county, illegally collected from him, the Arizona Supreme Court stated that the county "is constituted the agent of the state to collect the taxes for the state, the county, and school districts, and the law has made it responsible to the taxpayer for a tax illegally collected."

Maricopa County vs. Hodgin, 46 Ariz. 247,
50 Pac. (2d) 15, 101 A. L. R. 793.

Must a county also be denied its right to appear on behalf of the state unless it can persuade the attorney general to assist in its representation?

Pima County employed the special counsel who here appear to assist the county attorney in this litigation. That contract was sustained by the Arizona Supreme Court.

Pima County vs. Grossetta, 54 Ariz. 530, 539;
97 Pac. (2d) 538.

In any event the point is without merit because the attorney general appeared in the district court for all the defendants and signed the answers filed on their behalf which raised the constitutional questions now asserted. (Tr. 168, 186). The attorney general has also entered his appearance in this court.

A. 3. (p. 13) It may be conceded that if the counties, which are before the bar of this court as such, are in no position to asert their claims to the taxes here involved, then the boards of supervisors have no such right. Nevertheless, they were made parties defendant to these suits and in view of their responsibility to prepare a budget of the county expenses and supervise the assessment, collection and disbursement thereof, it would seem that they have a right on behalf of their counties to claim that the taxes in question are legally collectible.

Section 17-309, A. C. A. 1939, provides:

> "The Board of Supervisors under such limitations and restrictions as are prescribed by law may*** (14) direct and control the prosecution and defense of all actions to which the county is a party, and compromise the same."

The county may appear either by its county attorney or special counsel approved by the Board of Supervisors or both.

Pima County vs. Grossetta, supra.

A. 4. (a) (b) (c) (d) (e) (f) (g) (p. 13, 14, 15, 16, 17, 18).

These points are covered by briefs heretofore filed by petitioners. (a) For cases that the United States is a person within the meaning of the Fifth Amend-

ment, see pages 20, 21 of Brief on Petition for Certiorari and pages 6 to 13 of our Supplemental Brief. (b) The cases do hold that a part of a state may not, in the federal courts at least, challenge the state itself under the due process clause of the Fourteenth Amendment. We have already stated the reason given by the courts for this holding. Trenton vs. New Jersey, supra. A part of a state (and a fortiori the state itself) may nevertheless, as against the United States, rely upon the compensation clause of the Fifth Amendment, though its language be less appropriate to public bodies than the due process clause of the same amendment.

Wayne County vs. U. S.,
53 Ct. Cl. 417;
Affirmed 252 U. S. 574;
40 Sup. Ct. Rep. 394;
64 L. Ed. 723.

(c) (d) (e) (f) and (g) (p. 14, 15, 16, 17, 18) throw, we submit, very little light on the problem. The earliest direct expression by the Supreme Court on the right of a state to challenge the constitutionality of an act of Congress on the ground that it deprived the state of its rights is found in

Pennsylvania vs. Wheeling Bridge Co.,
18 Howard 421;
15 L. Ed. 435.

The majority held that the judgment for costs could not be destroyed by Congress and, by way of careful dicta, that had the state recovered a judgment for damages rather than an injunction, necessarily executory in its nature, Congress would have been powerless to destroy such judgment.

A. 5. (p. 22) Under the Tenth Amendment, the power of the state which is reserved is that of taxation of any property within its taxable jurisdiction. It is undenied that the personal property here taxed was not taxable by the state until Congress gave its consent. Once, however, the power of the state attached, it was complete and not subject to withdrawal by Congress. That Congress could by indirection accomplish such withdrawal—disallow suit to collect such taxes—assuming such power in this case, (see contra Bank of U. S. vs. Planters' Bank of Georgia, 9 Wheat. 904; 6 L. Ed. 244)—is of no consequence. Congress has not withdrawn the consent to sue these institutions.

B. 1. (p. 27) In our opening brief (page 17) we discussed the contention of respondent that the consent to this taxation was a mere withdrawable gratuity. We see no need for a further discussion.

B. 2. (p. 30) The contention is that by a mere inadvertence Congress overlooked an express withdrawal of the right to tax this preferred stock. This Court in its careful and unanimous decision in

> Baltimore National Bank vs.
> State Tax Commission,
> 297 U. S. 209;
> 56 Sup. Ct. Rep. 417;
> 80 L. Ed. 586.

applied the appropriate canons of interpretation for the determination of the purpose behind the act, and held that Congress had not intended to withdraw the consent to tax.

B. 3. (p. 33) That the act is retroactive is obvious from its terms.

B. 4. (p. 34) This point is discussed in our opening brief at page 26.

Respondent's plea for consideration because if it pays the taxes it cannot collect them back from Reconstruction Finance Corporation is not very pertinent; nor is it a correct view of the law. If the liens of these taxes are valid and the respondent bank pays the taxes, the bank then has recourse against Reconstruction Finance Corporation by virtue of its lien, (Sec. 73-205 Arizona Code Annotated, 1939, set forth at pages 8 and 9 of Petitioners' Brief in Support of Petition for Writ of Certiorari) and respondent is subrogated to the right of the state against Reconstruction Finance Corporation. (Sec. 73-205, supra).

See also:

Brophy vs. Powell, ———Ariz.———, 121 Pac. (2d) 647, 655.

B. 5. (p. 37) The decision of the Arizona Territorial Supreme Court in

Territory vs. Perrin, 9 Ariz. 316, 83 Pac. 361,

was based on its conception of general principles of law. It is directly contrary to the views of the United States Supreme Court as announced in

U. S. vs. Alabama, 313 U. S. 274, 85 L. Ed. 1327, 61 Sup. Ct. Rep. 1011,

and consequently lost its value as a precedent, and further because the Supreme Court of the territory of Arizona, at the time of the rendition of the decision in the case of *Territory vs. Perrin,* supra, was a member of the federal judicial system. Furthermore, it is

at variance with the Arizona State Supreme Court's decision in

Gietz vs. Webster, 46 Ariz. 261,
50 Pac. (2d) 573.

In the last part of the conclusion of respondent's brief is found the following statement:

> "These appellants originally did not deny the validity of that act; they first sought to avoid its effect by denying its application, (Transcript of Record, 154-155, 172-173); and now, on this appeal, are so reluctant to release their tentative grip upon the forced gift that they change their position to deny the power of the giver to limit the effect of his own gift."

This statement is less accurate than the facts reveal. These petitioners pleaded in the District Court, by way of defense, that the Act of March 20, 1936, was unconstitutional and void in its application to the taxes levied upon respondent's preferred stock. (Tr. 167, 185).

The conclusions of law of the trial judge recite that Maricopa County and Pima County taxed respondent's preferred capital stock owned by Reconstruction Finance Corporation. (Tr. 258, 259 and 325, 326).

The Circuit Court of Appeals (130 Fed. (2d) 356) confines its decision to the validity of the taxes upon respondent's shares of preferred capital stock while in the ownership of Reconstruction Finance Corporation.

Thus it appears that from the inception of this litigation, until now, petitioners have invoked the protection of the Federal Constitution against the retro-

active feature of the Act of March 20, 1936 in its application to taxes levied upon respondent's preferred shares of capital stock while in the ownership of Reconstruction Finance Corporation.

Respectfully submitted,

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Appendix Follows

APPENDIX

Sec. 73-703 A. C. A. 1939:

"73-703. *Collection of tax on personal property—Sale and proceedings.*—The county treasurer may at any time after receiving the roll, collect, by distraint and sale if not otherwise collected, the taxes due on personal property. The sale must be at public auction, after one (1) week's notice of the time and place thereof, given by publication in a newspaper in the county, or by posting notices thereof in three (3) public places therein, and of a sufficient amount of the property thereof to pay the taxes, fees, and costs. For seizing and selling personal property, the treasurer may in each case charge three dollars ($3.00) and the same mileage as allowed by law to the sheriff in serving civil process. On payment of the purchase price and the delivery of the property with a bill of sale, the title thereto vests in the purchaser; all excess over taxes, fees, and costs, shall be returned to the owner of the property sold, and until claimed shall be deposited in the county treasury, subject to the order of the owner. Before seizing the rolling stock of a railroad company, when the real estate of such company within said county is not sufficient to secure the payment of the tax on both the real and personal property assessed to said company, the treasurer shall notify one of the agents, conductors, or persons in charge of a station or freight depot of said company, that unless the tax be paid within ten (10) days thereafter, he will distrain the personal property belonging to said company for the taxes due thereon.

"If the county treasurer has reason to believe that any person assesed with taxes upon personal property is about to remove such property from the county, or to sell, conceal, or other-

wise dispose of the same, he shall at once after such taxes are due, collect the same with costs and charges, by distraint and sale of any personal property of such person in the manner herein provided."

Sec. 73-410 A. C. A. 1939:

"73-410. *Personal property tax paid when assessed — Enforcing payment.* — The county assessor, when he assesses the property of any person, not owning real estate within the county of sufficient value in the assesor's judgment to pay taxes on both the real and the personal property of such person, shall immediately collect the taxes on the personal property so assessed, and if the owner shall neglect or refuse to pay, the assessor shall seize sufficient of said personal property to satisfy the taxes and costs, and shall post a notice of such seizure, with a description of the property, in three (3) public places in the county, one (1) of which shall be in the precinct where it is seized, and shall, at the expiration of three (3) days sell at public auction, at the time and place mentioned in the notice, to the highest bidder, for cash, a sufficient quantity of said property to pay the taxes and expenses incurred and issue to the purchaser a certificate of sale. If the owner shall give bond with sufficient security, to be approved by the assessor, and sufficient to cover the amount of the taxes due and the costs incident to seizure, the said property shall be released to said owner, and for this service the assessor shall be paid a fee of three dollars ($3.00) and mileage. If the asesor is unable to find, seize, and sell sufficient of the property of such person to pay the taxes and costs of sale, and such person shall neglect or refuse, on request of the assessor, to pay the same, or neglect or refuse to turn out property sufficient

to pay such taxes and costs of sale, the assessor shall file in a court having jurisdiction, an affidavit showing the assessment, the amount of taxes, the inability to find and seize property sufficient to pay the same and costs of sale, and the neglect or refusal to pay or turn out property sufficient to pay the same and costs of sale; the court or justice shall thereupon issue a citation, to be served as a summons, ordering the party to appear at a time within five (5) days, to be fixed by the court, to answer, under oath, concerning his property. If it shall appear that such party has any money, goods, chattels, or effects to satisfy such taxes and costs of sale, and also costs of proceeding on the citation, the court shall order the party to deliver to the assessor such property, and if the party neglect or refuse to answer the citation, or the order to deliver such property, he shall be in contempt. For such services such fees shall be allowed as for similar services in civil cases, to be collected only from parties owing such taxes, and be paid into the county treasury. In other respects than herein provided, the proceedings shall be conducted as provided in proceedings supplemental to execution. If it appears from the affidavit of the assessor that such person is about to abscond from the county, or is about to convey his property with intent fraudulently to evade the payment of such taxes, the citation may direct the officer serving the same to arrest such party, and bring such party before the court. It shall be unlawful for a party served with the citation to sell or transfer his property or effects so as to defeat the collection of taxes or costs, and any person so doing shall be guilty of a misdemeanor. Should the said taxes be not collected by such process, then no liability shall attach to the assessor. All excesses over the taxes and costs of the proceeds of any

such sale must be returned to the owner, and until claimed, must be deposited in the hands of the county treasurer, subject to the order of the owner. The unsold portion of any property may be left at the place of sale at the risk of the owner. The assessor shall be governed as to the amount of taxes to be collected by him on the aforesaid personal property by the state and county rate of the previous year.

"The assessor, on the first Monday of each month, shall make a settlement with the county treasurer and pay into the treasury all moneys collected by him for such taxes during the preceding month. The assessor shall, as soon as he has collected the taxes on such personal property, give the owner a receipt therefor and thereafter mark the same paid, together with the amount opposite the name of the owner in the assessment roll, and in an assessor's cash book. Personal property in transit, or temporarily in a county, shall be assessed where the owner is domiciled."

RESPONDENT'S BRIEF IN OPPO-SITION

No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

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Petitioners,

vs.

THE VALLEY NATIONAL BANK OF PHOENIX, a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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Subject Index

	Page
Act of Congress March 20; 1936 is a curative act	4
Applicability of Fifth Amendment to states and subdivisions thereof not necessary to be considered	4
Argument	2
Case decided upon the ground that Congress may withdraw privilege or gratuity at any time	4
Cases holding states may not tax national bank shares without consent of Congress	5, 6
Cases holding that privilege or gratuity may be withdrawn at any time	6
Cases holding Reconstruction Finance Corporation is governmental agency	3
Extracts from the Opinion of Judge Offutt	Appendix I.
History of Act of Congress March 20, 1936	Appendix II.
Public Rights subject to correction by acts of Congress	9, 10
Question presented by petition no longer of public interest	2
Validity of Act of March 20, 1936, recognized by all except petitioners	2
Purpose of Act of March 20, 1936	Appendix II.

Table of Cases

Page

Baltimore Nat. Bank v. State Tax Commission,
297 U. S. 209; 56 Sup. Ct. Rep. 417; 80 Law ed. 586 (1936) 6, 7

Bank of California v. Richardson,
248 U. S. 476; 39 Sup. Ct. Rep. 165; 63 Law ed. 372 (1919) 5

Bradley v. Illinois, 4 Wallace 459; 18 Law ed. 433, (1867) 5

Brandsford, Ex parte,
310 U. S. 354; 84 Law ed. 1249; 60 Sup. Ct. Rep. 947 3

Carpenter v. Wabash R. Co.,
390 U. S. 23, 27; 84 Law ed. 558; 60 Sup. Ct. Rep. 416 9

Charlotte Harbor & N. R. Co., v. Wells,
260 U. S. 8; 67 Law ed. 100; 43 Sup. Ct. Rep. 3 9

City of Clifton v. State Board of Tax Appeals,
17 Atl. (2d) 476 3

De Groot v. United States,
5 Wallace 419; 72 U. S. 700; 18 Law ed. 419 6

Des Moines Nat. Bank v. Fairweather,
263 U. S. 103; 44 Sup. Ct. Rep. 23; 68 Law ed. 191 (1923) 5

Dodge v. Board of Education,
302 U. S. 74; 82 Law ed. 57; 58 Sup. Ct. Rep. 98 6

Ex Parte, Bransford,
310 U. S. 354; 84 Law ed. 1249; 60 Sup. Ct. Rep. 947 3

First Nat. Bank v. Anderson,
269 U. S. 341; 46 Sup. Ct. Rep. 135; 70 Law ed. 295, (1925) 5

First Nat. Bank of Gulf Port v. Adams,
258 U. S. 362; 42 Sup. Ct. Rep. 362; 66 Law ed. 661, (1922) 5

First Nat. Bank v. Hartford,
273 U. S. 548; 47 Sup. Ct. Rep. 462; 71 Law ed. 767, (1927) 6

First Nat. Bank v. State Tax Commission,
43 N. M. 307; 92 Pac. (2d) 987 3
Certiorari denied: 308 U. S. 515; 84 Law ed. 439;
60 Sup. Ct. Rep. 173 3

Frisbie v. United States,
157 U. S. 160, 162; 39 Law ed. 657 6

Graham v. Goodcell,
282 U. S. 409, 426; 75 Law ed. 415; 51 Sup. Ct. Rep. 186 8

Table of Cases (Continued)

Page

Hodges v. Snyder,
261 U. S. 600; 43 Sup. Ct. Rep. 435; 67 Law ed. 819 10

Iowa-Des Moines Nat. Bank v. City of Des Moines,
288 N. W. 409 (Iowa) 3

Lynch v. United States,
292 U. S. 571; 78 Law ed. 1434, 1439; 54 Sup. Ct. Rep. 840 6

McNair v. Knott,
302 U. S. 369; 82 Law ed. 307; 58 Sup. Ct. Rep. 245 8

Owensboro Nat. Bank v. Owensboro,
173 U. S. 664; 10 Sup. Ct. Rep. 537; 43 Law ed. 850 (1899) 5

Paramino Lumber Co. v. Marshall,
309 U. S. 370, 377; 84 Law ed. 814; 60 Sup. Ct. Rep. 600 9

People v. Weaver,
100 U. S. 539; 543; 25 Law ed. 705, (1880) 5

Phipps v. School District of Pittsburgh,
111 Fed. (2d) 393, 396 9

Rafferty v. Smith Bell & Co.,
257 U. S. 226; 66 Law ed. 208; 42 Sup. Ct. Rep. 71 9

Reconstruction Finance Corp., v. Elder, Collector,
26 Fed. Supp. 772 ..... 3, 5, 8

Salt Co., v. East Saganaw,
13 Wallace 373; 20 Law ed. 251; 80 U. S. 611 6

State of Pennsylvania v. Wheeling & Belmont Bridge Co.,
18 Howard, 355; 59 U. S. 460; 15 Law ed. 449 10

State Tax Commission v. Baltimore Nat. Bank,
199 Atl. 119; 174 Md. 403 ..... 3, 7

United States v. Cook,
257 U. S. 523; 66 Law ed. 350, 351; 42 Sup. Ct. Rep. 200 6

United States v. Heinszen & Co.,
206 U. S. 379, 386; 51 Law ed. 1098 9

United States v. Teller,
107 U. S. 64; 27 Law ed. 352 6

Van Allen v. Assessors,
3 Wallace 573; 18 Law ed. 229 (1866) 5

Van Horn v. Hines, 122 Fed. (2d) 207;
Certiorari denied, 62 Sup. Ct. Rep. 360; 86 Law ed. 257 6

Western Union Telegraph Co., v. Louisville & N. R. Co.,
258 U. S. 13; 66 Law ed. 437; 42 Sup. Ct. Rep. 258 10

No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARICOPA COUNTY, ARIZONA; W. H. LINVILLE, as County Treasurer, and Ex-Officio Tax Collector of Maricopa County, Arizona; J. D. BRUSH, as County Assessor of Maricopa County, Arizona; CHARLES H. FIELDS, JOHN A. FOOTE and GEORGE FRYE, as members of and constituting the Board of Supervisors and County Board of Equalization of Maricopa County, Arizona; PIMA COUNTY, ARIZONA; WALLACE S. BRANSFORD, as County Treasurer and Ex-Officio Tax Collector of Pima County, Arizona; CHARLES M. TAYLOR, as County Assessor of Pima County, Arizona; THOMAS COLLINS, R. H. MARTIN, and J. B. MEAD, as members of and constituting the Board of Supervisors and County Board of Equalization of Pima County, Arizona.

Petitioners.

vs.

THE VALLEY NATIONAL BANK OF PHOENIX, a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS DELIVERED

The trial court wrote no opinion.

The opinion of the Circuit Court of Appeals does not yet appear in the reports. It is printed in the Transcript of Record, pages 381-387.

JURISDICTION OF SUPREME COURT

It is admitted that this court has jurisdiction over this case on Certiorari. It is submitted, however, that no ground for review is presented under Subdivision 5 of Rule 38 of this court.

STATEMENT OF CASE

Respondent accepts the summary statement of matter involved on pages 3-11 of the petition for writ of certiorari.

ARGUMENT

Question presented by Petition no longer of Public Interest.

Validity of Act of Congress March 20, 1936 Recognized by all except Petitioners.

Petitioners invoke the jurisdiction of this Court on certiorari upon the ground that "the decision of the Circuit Court of Appeals was on an important question of federal law which has not been but should be settled by this Court, to-wit: Whether the Congress can constitutionally destroy by retrospective legislation a state tax lawful when levied and levied with the consent of the Congress upon the preferred capital stock of a national banking association while in the ownership of Reconstruction Finance Corporation." Petition for writ of certiorari p. 10.

We call the Court's attention to the fact that petitioners admit the validity of the provisions of the Act of Congress of March 20, 1936, which are prospective in their operation and attack only those provisions of said act which operate retrospectively.

The taxes which petitioners seek to uphold were levied in the years 1935 and 1936. It is obvious that the questions presented by these cases must have arisen in

many states of the Union during those years and that in the subsequent years from 1937 to the present time the question cannot have arisen for during said years the taxes have been levied under the prospective provisions of the statute, the validity of which is admitted. Only two cases are found in the reports in which the question under consideration has been raised. These are Reconstruction Finance Corporation vs. Elder, 26 Federal Supplement 772, in which the validity of the Act of Congress was upheld in its entirety and First National Bank vs. State Tax Commission, 43 N.M. 307, 92 P. (2) 987, in which case a state tax for the year 1934, levied upon the preferred stock of the plaintiff in that case, while held by Reconstruction Finance Corporation, was held void and petition for writ of certiorari to this Court was denied without opinion, 308 U.S. 515, 84 L. ed. 439, 60 S. Ct. Rep. 172.

The fact that Reconstructon Finance Corporation is a governmental agency and its property is properly exempted from taxation by Congress as being the property of the United States is recognized generally by the state courts.

State Tax Commission vs. Baltimore National Bank, 199 Atl. 119; 174 Md. 403.

City of Clifton vs. State Board of Tax Appeals, 17 Atl. (2) 476.

Iowa Des Moines National Bank vs. Des Moines, 288 N.W. 409

See also:

Ex-Parte Bransford, 310 U.S. 354; 84 L. ed. 1249; 60 S.Ct. Rep. 947

in which this Court was called upon to determine

whether one of the cases involved in the instant petition for certiorari was a three judge case.

Petitioners are in the position of asserting the unconstitutionality of the retrospective provisions of a statute which have been acquiesced in by the various taxing authorities of the other states of the Union and, indeed, by the State Tax Commission and the Boards of Supervisors of the other counties of their own state that have not joined in their appeal so that they may truly be said to invoke the jurisdiction of this Court to set aside a portion of the Act of Congress in question for their exclusive benefit and for the purpose of recovering a substantial amount from the treasury of the United States upon a ground which all others affected thereby have not insisted upon at least to the extent of coming to this Court. What might have been a public question, if brought seasonably to this Court when the act was first passed and when this Court might appropriately have undertaken to determine the question as one of public interest, is today merely a private claim on behalf of two counties of the State of Arizona, that are striving to get a special advantage which others have not received. While undoubtedly petitioners have the right to their day in court, that right has been adequately recognized by the hearings granted them in the District Court and the Circuit Court of Appeals, both of which found no merit in their contentions.

ON THE MERITS

Question of Applicability of 5th Amendment to States and Their Subdivisions Not Necessary to be Decided.

Case Decided Upon Ground That Congress May Withdraw Privilege or Gratuity at Any Time.

Act of Congress March 20, 1936, is a Curative Act to Correct Inadvertent Error in Legislation.

Petitioners rest their case upon alleged violation by the provisions of the statute in question of the 5th Amendment to the Constitution. The Circuit Court of Appeals did not find it necessary to consider the application of said amendment to states and subdivisions of states but disposed of the case upon the ground that it was settled by the decisions of this Court that since shares of stock in national banks were subject to state taxation only by the consent of Congress taxation of such shares with the consent of Congress was a privilege or gratuity that might be withdrawn at any time before collection of the tax and that when so withdrawn the right to such collection ceased. The Court followed in this respect the opinion of the District Court of Georgia in the case of Reconstruction Finance Corporation vs. Elder, 26 F. Supp. 772, which decision is amply supported by the decisions of this Court.

Shares of stocks of national banks can be taxed by the states only with the consent of Congress.

Van Allen vs. Assessors, 3 Wallace 573; 18 L. ed. 229.

Bradley vs. Illinois, 4 Wallace 459; 18 L. ed. 433.

People vs. Weaver, 100 U.S. 539, 543; 25 L. ed. 705.

Owensboro National Bank vs. Owensboro, 173 U.S. 664; 19 S. Ct. Rep. 537; 43 L. ed. 850.

Bank of California vs. Richardson, 248 U.S. 476, 482-484; 39 S. Ct. Rep. 165; 63 L. ed. 372.

First National Bank v. Adams, 258 U.S. 362, 364; 42 S. Ct. Rep. 362; 66 L. ed. 661.

Des Moines National Bank v. Fairweather, 263 U.S. 103, 106; 44 S. Ct. Rep. 23; 68 L. ed. 191

First National Bank vs. Anderson, 269 U.S. 341; 347; 46 S. Ct. Rep. 135; 70 L. ed. 295.

First National Bank vs. Hartford, 273 U.S. 548; 47 S. Ct. Rep. 462; 71 L. ed. 767.

Baltimore National Bank vs. State Tax Commission, 297 U.S. 209; 56 S. Ct. Rep. 417; 80 L. ed. 586

A privilege or gratuity granted or conferred by the United States may be withdrawn at any time by act of Congress.

Lynch vs. U. S., 292 U.S. 571; 78 L. ed. 1434, 1439; 54 S.Ct.Rep. 840

De Groot vs. U. S., 5 Wallace 419; 72 U.S. 700; 18 L. ed. 419

U. S. vs. Teller, 107 U.S. 64, 68; 27 L. ed. 352

Frisbie vs. U. S., 157 U.S. 160, 162; 39 L. ed. 657

U. S. vs. Cook, 257 U.S. 523; 66 L. ed. 350, 351; 42 S. Ct. Rep. 200

Van Horn vs. Hines, 122 F. (2) 207; Certiorari denied, 62 S. Ct. Rep. 360; 86 L. ed.257

Salt Co. vs. E. Saginaw, 13 Wallace 373; 20 L. ed. 251; 80 U.S. 611

Dodge vs. Board of Education, 302 U.S. 74; 82 L. ed. 57; 58 S.Ct. Rep. 98

Petitioners seek to avoid the force of the above authorities by contending that the cases permitting withdrawal of privileges or gratuities do not apply because withdrawal of the consent to tax after the lien of the tax has attached may interfere with the orderly collection of the state's revenue. That is an argument more properly addressed to Congress than to the courts. As pointed out by the above cases the right to tax the property of the United States is withdrawn from the states by the Federal Constitution.

In creating Reconstruction Finance Corporation, Congress did not set up an organization out of which the United States was to make a profit. The purpose of that Act was to assist the several states and the citizens thereof to survive the depression. The purpose of the particular Act authorizing Reconstruction Finance Corporation to purchase preferred stock of national banks is well stated in the extract from Judge Offutt's opinion in the case of Tax Commission v. Baltimore National Bank, supra, quoted in the appendix to this brief.

The consent of Congress to state taxation of preferred bank stock held by Reconstruction Finance Corporation found to have been granted by the decision of this court in Baltimore National Bank v. State Tax Commission, 297 U.S. 209; 56 S. Ct. R. 417; 80 L. ed. 586, in fact operated as the grant of a double gratuity. The Federal Government first supplied the use of the funds with which to purchase the shares and, second, permitted the states to tax the shares purchased with the funds advanced for that particular purpose. Thus the United States first put the money into the local communities for the purpose of saving those communities from all the evils of closed banks and second consented that the local authorities tax this money which had been put into the communities for their benefit. The granting of this second gratuity through consent to state and local taxation was due wholly to the failure of Congress to have in mind or correctly apprehend the effect of its former legislation permitting the taxation of shares of stock of national banks.

The Circuit Court of Appeals might well have mentioned the aforesaid oversight of Congress as additional ground for upholding the validity of the Act of March

20, 1936, as was done by the District Court of the Northern Division of Georgia in the case of Reconstruction Finance Corporation vs. Elder, supra, in which that court stated:

> "In my opinion, it is clear that the privilege to tax such stock standing in the name of Recontsruction Finance Corporation, a purely governmental agency, resulted from mere oversight on the part of Congress and that it was never the intention of Congress to permit the taxation of such shares when so owned; that this oversight was corrected as soon as possible after the Supreme Court decision, supra, by the passage of the Act of March 20, 1936 which expressly, and without ambiguity, undertakes to annul such privilege with respect to present, future and past assessments."

That the purpose of the Act of March 20, 1936, was to correct an inadvertent omission of Congress is made clear from the statement of the history of the Act inserted in the appendix hereto.

In view of the history of said Act of March 20, 1936, its validity must be sustained on the principle of the following cases, which may be briefly stated as follows:

> "Congress has the power to correct an inadvertent defect in an act of legislation discovered by the administration thereof, or by decisions of the courts, and by such correction destroy existing causes of action arising out of the defect in the act where such causes of action are not supported by any substantial equity."

Graham vs. Goodcell, 282 U.S. 409, 426; 75 L. ed. 415, 439; 51 S. Ct. Rep. 186.

McNair vs. Knott, 302 U.S. 369; 82 L. ed. 307; 58 S.Ct. Rep. 245.

Paramino Lumber Co. vs. Marshall, 309 U.S. 370, 377; 84 L. ed. 816; 60 S. Ct. Rep. 600.

Carpenter vs. Wabash R. Co., 390 U.S. 23, 27; 84 L. ed. 558; 60 S. Ct. Rep. 416.

Rafferty vs. Smith Bell & Co., 257 U.S. 226; 66 L. ed. 208, 210; 42 S. Ct. Rep. 71.

United States v. Heinszen & Co., 206 U.S. 370, 386; 51 L. ed. 1098.

Charlotte Harbor & N. R. Co. vs. Wells, 260 U.S. 8; 67 L. ed. 100; 43 S. Ct. Rep. 3.

Phipps v. School District of Pittsburgh, 111 Fed. (2d) 393, 396.

The principle above stated certainly applies in the present case. The petitioners have no substantial equity in their favor. The money raised by the preferred shares which they sought to tax was brought into those counties to save their citizens from the unfortunate experience of closed banks and to provide them with proper banking facilities. The bringing in of such funds took from them no right to tax anything which they could tax before and the opportunity to tax preferred stock held by Reconstruction Finance Corporation was given them merely by an oversight of Congress, upon which they seized. Congress by the Act of March 20, 1936, merely deprived them of the opportunity to realize upon their efforts to tax the preferred shares which opportunity Congress never intended to bestow and which was withdrawn before it could be realized upon by even the most grasping.

Petitioners seek to make something out of the fact that the rights claimed by them are public in their nature. That does not better their case. The rule permitting the cancellation of causes of action by the cor-

rection of defects in legislation by subsequent action of the legislature is more liberal where only public rights will be affected by the curative measure.

Hodges vs. Snyder, 261 U.S. 600; 67 L. ed. 819; 43 S. Ct. Rep. 435.

Western Union Telegraph Co. vs. Louisville & NR. Co., 258 U.S. 13; 66 L. ed. 437; 42 S. Ct. Rep. 258.

State of Pennsylvania vs. Wheeling & Belmont Bridge Co., 18 Howard, 355; 59 U.S. 460; 15 L. ed. 449

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix Follows

APPENDIX

Extract from the opinion of Judge Offutt in the case of State Tax Commission vs. Baltimore National Bank, 199 Atl. 127-128:

"As pointed out in State Tax Commission vs. Baltimore National Bank, 169 Md. 65, 77, 180 A. 260, the Finance Corporation may become, in a way, a partner in a business which it aids, and may share in the profits thereof. But those are mere incidents of its primary purpose and function which was to rehabilitate institutions which either had collapsed, or which without such aid would have collapsed, by granting credit and aid when all other sources of credit had dried up and there was no other aid.

"Mr. Jesse H. Jones, chairman of the corporation, in a statement in evidence under a stipulation, said that when the act was passed, out of a total of 24,600 banks in operation in 1930, 5,500 having deposits of three and a half billion dollars had been forced to suspend even before the bank holiday, and that after the holiday four billion dollars of additional deposits were tied up in nearly 4,200 unlicensed or restricted banks that had been open before the holiday but not thereafter. Depositors fearful for the safety of their funds steadily withdrew their deposits, the deposits of member banks of the Federal Reserve System declined by approximately seven billion dollars, many communities were without banking facilities, private lenders were unable or unwilling to supply additional capital to the banks, and the banks in turn were unable to supply the 'essential credit needs of business and industry which suffered accordingly.' Bank failures and suspensions were increasing, many states declared bank holidays, even the strongest banks were in danger, and the entire banking system of the nation was facing collapse.

"Whatever may be said of the danger that the swift currents of the ever widening whirlpool of federal activities will carry beyond the taxing power of the states so much property as to threaten the very existence of our dual form of government, it cannot be denied that the primary and essential duty of the national government in that crisis was to prevent, if possible, the complete collapse of the nation's credit, irreparable damage to its commerce and industry, and the chaos and disorder which were likely to follow. Nor can it be denied that the Reconstruction Finance Corporation as the agency employed to grant that aid was an essential instrumentality of the national government created and existing to perform a governmental function of the highest possible importance. Every reason advanced by the courts in support of the immunity of national banks, and the Federal Reserve Bank from state taxation, applies with at least equal force to the Finance Corporation. Neither performs a function more immediately essential to the continuance and integrity of the national government, while on the other hand both are operated for private profit, and the stock of both is owned in part by private investors. Nor is there rational support for the theory that the use of the nation's resources to avert a common national disaster is beyond the natural and legitimate scope of the powers granted to the national government 'in order ot form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare.' "

PURPOSE OF ACT OF CONGRESS MARCH 20, 1936

The Bill which culminated in the Act of March 20, 1936 came before the Congress under unanimous favorable report from the appropriate Committee of each House. (Congressional Record, Vol. 80, pages 3965 and 4046.)

The measure was at all times treated as a remedial one for the avowed purpose of closing "an unintended legislative gap." This was taken for granted in the Senate and was soon made clear to the membership of the House by the leading members of the Committee on Currency and Banking. The statements to this effect in the record are so numerous that it would be exceedingly tiresome to catalogue them.

On March 19, 1936, the day on which the curative measure was enacted by Congress and the day before it was approved by the President, Mr. Hancock of North Carolina said, in explaining the object and purpose of the law, the following:

> "This bill is sound, meritorious, and in the public interest. Its passage will merely restore to the Reconstruction Finance Corporation, an instrumentality of the Federal Government, its constitutional immunity from taxation, which immunity Congress unquestonably intended it should have at the time of the passage of the act in 1932. Its necessity arises as a result of a recent decision of the Supreme Court in the case of Baltimore National Bank against Maryland State Tax Commission, in which the Court held that Article X of the act specifically exempting the Corporation, its franchise, capital, reserves, surplus and income from taxation, both State and Federal, was not effective in the face of section 5219 of the Revised Statutes passed in 1864 which expressly authorizes States to tax national bank shares, within certain limitations, regardless of ownership. The immunity from taxation upon the passage of the bill applies to the R. F. C. alone because it is a Federal Agency. *The bill, therefore, does no more than to close an unintended legislative gap.* It will not in any way affect the rights of any State taxing authority or municipal authority to levy taxes against the pre-

ferred stock, notes, or debentures held by any individual or other corporation." (Congressional Record, Vol. 80, page 4043) (Italics supplied.)

On February 24, 1936 Senator Barkley, in explaining the object and purposes of the bill to the Senate, used these words:

"It is simply the correction of either an oversight, or lack of foresight, or lack of sufficiently broad language to cover what was sought to be covered. The Supreme Court said it was not covered and we are simply trying to correct the mistake."

On the same day Senator Adams said:

"The theory of the bill is to carry out the intent of Congress when the original banking act was enacted, that the stock held by the Reconstruction Finance Corporation should not be taxed. In no place, so far as I know, has there been payment of the tax." (Congressional Record, Vol. 80, page 2646.)

On the same day Senator Barkley made this further statement:

"It was thought that the Reconstruction Finance Corporation Act, which attempted to exempt from taxation this stock and the securities held by it, was broad enough to cover all sorts of securities it might hold including preferred stock in these banks. The Government made that contention in the lawsuit originating in Maryland and decided by the Supreme Court. The Court held that the language of the act was not broad enough to include this particular kind of security and therefore it was taxable. The bill is for the purpose of putting such securities on the same basis with any other securities held by the Reconstruction Finance

Corporation and all other governmental agencies like the land banks, the certain limitations, regardless of ownership." *Vol. 80 page 4043.*

Senator Robinson said:

"It occurs to me that the primary question to be solved in relation to this proposed amendment is, what was the original intention of Congress when, in order to save banks threatened with ruin, it authorized the Reconstruction Finance Corporation to purchase preferred stocks?

Of course, the Supreme Court has held, in the case referred to by the Senator from Michigan, that the language used in the act did not actually and legally relieve such preferred stocks from liability to tax by the States. That decision, of course, is conclusive and binding; but still the question arises as to what was actually the intention of the Congress. Did the Congress, at the time it authorized the Reconstruction Finance Corporation to purchase preferred stocks in banks for the purpose with which we are all more or less familiar, actually intend that such stocks should be subject to taxation by the States? If it did, the question as to whether this proposed legislation should be passed is different from that which arises in my mind if it is made clear that the original intention was to exempt such stocks from taxation. (Page 2648)

To my mind the answer to the whole argument is comprehended in the question I originally propounded, what was the actual intention of the Congress, taking into consideration the record that has been made and referred to here by the various Senators, and the further fact, which, in my judgment, is of itself controlling, namely, that the Reconstruction Finance Corporation was not created by the United States for the pur-

pose of making profit. It was created as an agency to save private industry and private organizations, so that it cannot be regarded as a profit-making organization, although I hope it will, at least in the long run, earn enough to offset such losses as may be made on the loans which have been negotiated.

If the Government did not intend when it created this corporation that its preferred stock should be taxed, if it placed that construction on it—and most of the States did the same thing—in my judgment the enactment of the proposed legislation is not only warranted, it is essential." (Congressional Record, Vol. 80 pages 2647 and 2649.)

Senator Barkley here interposed:

> "The Court's decision was based upon an old statute regulating national banks, a statute passed before the Reconstruction Finance Corporation was created, which, of course, gave consent of the Federal Government to the taxation of shares of national banks in the State. The Senator knows how impossible it is for us, in the passage of a new act, to specifically repeal or withdraw every exemption or every provision of an old act which may have been enacted before. There is no doubt but that when Congress passed the general legislation referred to by the Senator from New York, it intended that all of these securities, whatever was held by the Reconstruction Finance Corporation, outside of real estate, should be exempt from local taxation. The mere fact that the Court held that it was not broad enough or specific enough to do that it seems to me should not militate against the enactment of the pending bill correcting that, and making it specific in the law." Congressional Record Vol. 80, page 2649.

In the House Mr. Ford of California hit the nail on the head when he likened the situation of the Government allowing its own property to be taxed when in the hands of a concern which it had created to save the Country to the homely absurdity of allowing a man to punish a helpful stranger for saving him from destruction. He said the condition of affairs which would be left if Congress failed to make the correction and close the hiatus might well be compared to *"an old chap who owned a small ranch through which a stream ran, and he had signs all over it, 'No trespassing'; and one day he himself fell in and a stranger went in and rescued him, and then he turned around and had the stranger arrested for trespassing on his property."* (Congressional Record, Vol. 80, page 3971.) (Italics supplied.")

Mr. Hollister without speaking a parable made the point equally vivid when he said:

> "Of course, if the bill is not passed, the States have the right under the decision of the Supreme Court in the Maryland case to tax preferred stock in national banks. The bill removes that right. But that is only a right which has existed since the Reconstruction Finance Corporation came into being. *There is no taking away any right which the State had before the Reconstruction Finance Corporation stepped into the picture."* (Congressional Record, Vol. 80, page 4057.) (Italics supplied.)

Mr. Wolcott on the day before had already said this:

> "When we passed the original Reconstruction Finance Corporation Act, we exempted from local taxation their franchise, their own stock, their income, and everything except their holdings. I believe it was the intention of the Congress at that time to include the holdings of the Reconstruction Finance Corporation and, as I view this bill, it is

merely an attempt on our part to clarify what was very apparently our intention when the original Reconstruction Finance Corporation Act was passed." (Congressional Record, Vol. 80, page 3966.)

To go on would extend these quotations from the Congressional Record until they become tiresome. Congress was eagerly determined to promptly correct its inadvertent omission and exempt the preferred shares in national banks which the earlier act had failed to accomplish.